REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MALINDI

Criminal Appeal 11 of 2008

DANIEL BAYA MWERI …...……..…….…APPELLANT

VERSUS
REPUBLIC ……..……RESPONDENT

(From original conviction and in Criminal Case No. 340 of 2007 sentence of the Chief Magistrate's Court at Malindi before Hon. J. Kituku - RM)

JUDGMENT

Daniel Baya Mweri (the appellant) was convicted on a charge of grievous harm contrary to section 234 of the Penal Code that on the 6th day of February 2007 at Kwa Hadija village in Watamu location within Malindi District, he unlawfully did grievous harm to John Katana Baya.

Appellant had denied the charge and after due trial here prosecution called four witnesses, he was convicted and sentenced to serve six (6) years imprisonment.

The complainant John Katana Baya (PW1) is a brother in-law to the appellant (who has married his cousin). On 6th February 2007 at about 6.00pm, he was at home when appellant had differences with his wife Kadzo. So PW1 and Kadzo went to the village elder, and the matter was resolved. Appellant then took a panga inside his house (he stays in a room adjacent to the complainant). Appellant shone a torch on the complainant then cut him on the left hand after hitting PW1 on the head. He also cut PW1 on the ribs – PW1 ran and sought treatment and was admitted at Malindi District Hospital for sixteen days.

The panga was identified in court where it was produced as exhibit.

On cross-examination PW1 stated he had no grudge against the appellant and he didn't know why appellant cut him. However he explained that he intervened when appellant was beating his wife and explained that he did so to save his kin from being cut by the appellant.

Kibwana Shaban (PW2) a village elder at Timboni in Watamu received a report from appellant's wife that he had chased her away – and he got both parties to appear before him. Later appellant's wife went to him running and reported that appellant and complainant were fighting. PW2 rushed to the scene but found that they had stopped.

Then appellant got into the house and emerged, carrying a panga, and he begun chasing the complainant. PW2 tried to restrain him in vain and he saw appellant cut the complainant.

PW3 Pc Joseph Kamara received the appellant on the night of 6th February 2007 with a claim that he had been attacked by thugs and he had injured one of them using a panga. However before recording his statement, Pc. Kamara received a phone call from a village elder that there was someone who had been cut and had been rushed to Timboni Health facility. PW3 assumed it was the thug appellant had referred to, so in the company of the appellant, they proceeded to the health facility

where appellant confirmed that PW1 was the person he had cut. By then the complainant was unconscious. Appellant accompanied the officer to his house, the panga was recovered – it was then that the village elder (PW2) called PW3 aside and disclosed that appellant was actually the attacker and not the complainant.

So appellant was arrested. PW1 was eventually examined by one Ebrahim, a clinical officer at Malindi District hospital and found he had a 10 x 12 cm cut on the upper limb – there was a 7cm scar which was tender. The patient was unable to extend his left finger and an x-ray showed fracture of the ulna. The probable weapon used was a sharp object and the degree of injury was assessed as grievous harm.

Appellant's defence was that he had disagreed with his wife and she left the house – he traced her to the village elder in the company of the complainant. (whom he did no know was related to his wife).

The complainant started fighting him before eventually heading for an unknown place – Appellant and his wife then returned home, only to find about five people outside his door, and they all started beating him. So appellant screamed for help, the village elder came and the attackers all scampered away.

PW1 grabbed a panga from one of the assailants and that is what he used to cut appellant – he says this was done in self defence. So he went to the police station and made report to police.

The learned trial magistrate in his judgment noted that there was no doubt that the complainant was attacked by the appellant since appellant even admitted as much, but claimed to have done so in self defence. He examined the situation which led to the attack and held that the issue as to who assaulted the complainant was not a fact to be resolved by the court – I concur.

He then considered the issue of self defence which was raised by the appellant visa vis the provisions of section 170 of the Penal code which recognizes use of reasonable force to thwart any attempt on one's life or property from unlawful acts of third parties and held that the circumstances of this case did not present any threat to appellant's life or property. The trial magistrate was persuaded that the whole issue arose as a result of disagreement between appellant, his wife, and the complainant (being an in-law) only intervened to cultivate an amicable settlement by accompanying appellant's wife to go and report and this is what did not go well with the appellant. The trial magistrate concluded that the totality of the evidence showed that appellant had every intention to assault the complainant and the defence of self defence is misplaced.

Appellant's defence of having been under attack was rejected as the trial magistrate found no evidence to support such a claim.

The appellant challenges these findings in his amended grounds of appeal which are:

(1) Violation of his rights under section 72(3) (b) of the Constitution.
(2) Credible witnesses were left out
(3) The evidence adduced was unreliable.
(4) His defence was rejected without considering that there was bad blood between him and the complainant and he immediately reported the matter to police as he was the one under attack.

In his written submissions appellant stated that his rights were violated due to the amendment of the charge which led to delay in the matter being heard and in any event he was in police custody for over 24 hours having spent 16 days in police custody.

Miss Waigera for the State conceded that indeed the appellant was arrested on 6th February 2007 and taken to court on 7th March 2007 – which certainly was a violation of his constitutional rights. That is indeed a correct observation.

However she draws this court's attention to the fact that the trial magistrate addressed this issue of delay in his judgment saying prosecution had explained the delays as the complainant had been admitted in hospital for sixteen days and it was necessary to await his discharge

Of course even if that was the case, it was not a reason for police to hold the appellant for a whole month, after all it was not appellant who was admitted in hospital and police could sill have invoked the provisions of section 36 Criminal Procedure Code to file an apprehension report.

To that extent then I am in agreement with the appellant that his rights as provided under section 72(3) (b) of the Constitution were violated, as he was expected to be taken to court within 24 hours since the charge was not a capital offence.

His remedy lies in seeking compensation under section 76(6) of the Constitution.

He also complains that some crucial witnesses were not called and names his wife as being one such. It is correct that his wife

was not called as a witness but I think this is purely a legal principle – that she is not a compellable witness given their relationship – under section 127(2) of the Evidence Act it is provided as follows;

> ***"127 (2): - In criminal proceedings every person charged with an offence, and the wife or husband of the person charged, shall be a competent witness for the defence at every stage of the proceedings, …. Provided that;***
> ***(ii) the wife or husband of the person charged shall not be called as a witness except upon the application of the person charged."***

That settles the issue of some witnesses who were not called.

Indeed the independent witness to the whole incident was the village elder (PW2) who saw the entire attack from the beginning.

As for the malice which appellant alleges, I think the trial magistrate adequately analysed the cause of the disagreement and the appellant's reaction and drew the proper conclusion. Actually the report by appellant to the police was intended to cover up for his actions.

The upshot is that the conviction was safe and I uphold it. Appellant was sentenced to serve six years imprisonment and Miss Waigera submits that for an offence which causes life imprisonment it was not harsh.

Taking into account the circumstances and the injuries and the residual effects, I think six years is rather harsh, and to that extent, interfere with the sentence by setting it aside and substituting it with a four (4) years sentence which shall run from date of conviction.

Delivered and dated this **13th** day of **May 2010** at Malindi.

H. A. OMONDI
LADY JUSTICE